

# North American Free Trade & Investment Report

*WorldTrade Executive, Inc.*

*Biweekly report on legal & financial issues affecting direct investment and cross-border trade in Mexico, the U.S., and Canada*

## **United States: Trade**

### **Current Review of the U.S. Generalized System of Preferences Could Overturn Important Trade Benefits**

By Mark D. Nguyen (Bryan Cave LLP)

The current review of the U.S.'s Generalized System of Preferences (GSP) program could overturn a number of long-standing bilateral trade relationships with Brazil, India and other beneficiary developing countries.

The Office of the United States Trade Representative (USTR) is currently conducting a review of tariff preferences provided to 13 countries including Argentina, Brazil, Croatia, India, Indonesia, Kazakhstan, the Philippines, Romania, Russia, South Africa, Thailand, Turkey and Venezuela. Countries with upper-middle-income economies like Argentina, Brazil and India, are at risk of losing some or all

*See Trade, page 16➤*

## **Canada: Competition Law**

### **Canadian Competition Law: What's On the Agenda for 2007?**

By Mark Katz (Davies Ward Phillips & Vineberg LLP)

In several recent speeches, Canada's Commissioner of Competition, Sheridan Scott, has outlined her priorities and plans for the Competition Bureau for the upcoming year. Some of the priority items the Commissioner discussed are continued from previous years (e.g., an ongoing focus on cartels and abuse of dominance). The Commissioner also has announced several important new initiatives, such as studies into possible anti-competitive aspects of the generic pharmaceuticals industry and of self-regulated professions. Highlights from the Commissioner's agenda for 2007 are set out below.

#### **Cartels**

The Bureau's top enforcement priority continues to be fighting cartels, particularly domestic cartels. In support of that objective, the

*See Canada, page 11➤*

## **HIGHLIGHTS**

Vol. 16, No. 18  
October 15, 2006

The current review of the U.S.'s Generalized System of Preferences (GSP) program could overturn a number of long-standing bilateral trade relationships with Brazil, India and other beneficiary developing countries.

*Page 1*

Canada's Commissioner for Competition outlines the Bureau's priorities for the upcoming year.

*Page 1*

New consumer protection regulations provide safeguards for parties involved in real estate transactions in Mexico.

*Page 3*

Canada's Competition Bureau's apparent willingness to test the boundaries of the "regulated conduct defense" (RCD) means that individuals and entities operating in regulated industries in Canada should assess their conduct very carefully before deciding that it might benefit from the RCD's protection.

*Page 6*

➤ *Canada, from page 1*

Bureau's budget for cartel investigations has been increased by approximately 50 per cent over the last three years and the investigative capacities of the Bureau's regional offices have been strengthened.

The Bureau's campaign against domestic cartels got off to a start this year with the guilty plea that it secured in January 2006 from three distributors with respect to an agreement involving the distribution of carbonless sheets in Ontario and Québec.<sup>1</sup> As part of their plea arrangement with the Bureau, each of the parties agreed to pay a fine of \$12.5 million CDN, which represent the largest fines ever imposed in Canada for a domestic conspiracy. The parties also agreed to remove certain key personnel from their positions. The latter aspect of the plea arrangement reflects the Bureau's commitment to pursuing sanctions against individuals who participate in cartel activity, including incarceration in appropriate circumstances.

In September 2006, however, the Bureau suffered a setback when it had a conspiracy prosecution dismissed at the preliminary inquiry stage in *R. v. Bugdens Taxi et al.*<sup>2</sup> By its own admission, the Bureau has a poor track record when it comes to litigating conspiracy cases at trial, and *Bugdend Taxi* is a perfect illustration of this trend. The case involved charges under the *Competition Act*'s conspiracy provisions against six taxi companies and seven individuals from the St. John's, Newfoundland area. The allegation was that the accused had unlawfully conspired to refrain from tendering on contracts put up for bid to supply exclusive taxi services to the local airport, hospital, university and hotels. The accused also allegedly deterred others from bidding on the contracts. The goal was apparently to compel the institutions in question to accept a different arrangement that would have been more profitable for the accused.

At a preliminary inquiry (where the prosecution's burden of proof is very low), the judge held that while there was sufficient evidence of an agreement between the accused (indeed, no secret was made of the arrangement), the prosecution had failed to demonstrate that it could establish the requirement under Canadian conspiracy law that the agreement also be likely to result in an "undue" lessening or prevention of competition. In particular, the prosecution had not set forth a clear definition of the relevant market nor adequately explained how the agreement would have an "undue" impact on competition in that market. The judge was also influenced by the fact that the issue had been brought to the attention of the relevant regulatory body which had declined to intervene.

Because of its lack of litigation success in recent years, the Bureau had supported a proposal to eliminate the "undueness" requirement and create a "*per se*" conspiracy offense in Canada. This proposal was considered controversial and opposed by many in the Canadian competition bar. It was thus shelved for further study. The Commissioner has stated, however, that the Bureau continues to review possible amendment options for the *Competition Act*'s conspiracy provisions and hopes to commence public "technical roundtables" on the topic in 2007. Although the Commissioner did not say so specifically, it would not be surprising to see the Bureau again advocating a *per se* conspiracy offense for Canada.<sup>3</sup>

The Bureau's other major cartel-related initiative for the upcoming year is the review of its "immunity program", pursuant to which cartel participants are offered the incentive of immunity from prosecution if they are the "first in" to disclose their illegal conduct. The Bureau

---

***The Commissioner has stated that the Bureau continues to review possible amendment options for the Competition Act's conspiracy provisions and hopes to commence public "technical roundtables" on the topic in 2007.***

---

considers its immunity program to be one of its most effective tools for detecting, investigating and prosecuting cartel activity. The Bureau published a consultation paper in February 2006 soliciting views and comments on a series of questions relating to the immunity program. It is now considering the responses and hopes to publish a revised Information Bulletin on the topic by March 2007. As part of this effort, the Bureau also intends to issue a formal document on its policies regarding parties that do not qualify for immunity but seek to cooperate with the Bureau in return for more lenient treatment. Currently, the Bureau employs a largely case-driven, *ad hoc* approach to this issue.<sup>4</sup>

#### **Abuse of Dominance**

Combating abuses by "dominant" parties is a second ongoing enforcement priority of the Bureau. One initiative in this area will see the Bureau work to define more clearly the case selection criteria it employs. This analysis will no doubt be affected by the outcome of the *Canada Pipe* case, in which the Bureau is litigating the application of the abuse of dominance provisions to a loyalty rebate program. Earlier this year, the Federal Court of Appeal overruled the Competition Tribunal's

dismissal of the Bureau's application at first instance, on the grounds that the Tribunal had incorrectly interpreted the required legal tests.<sup>5</sup> The Federal Court of Appeal ordered the matter back to the Tribunal for rehearing. The respondent, Canada Pipe Company Ltd. (which is represented by Davies Ward Phillips & Vineberg LLP), has filed for leave to appeal to the Supreme Court of Canada.

Another Bureau initiative is the preparation of enforcement guidelines specific to the telecommunications industry. Just prior to the Commissioner's speech, the Bureau released a draft Information Bulletin describing how it intends to apply the abuse of dominance provisions to Canada's telecom industry. According to the Bureau, the guidelines are necessary because the continuing de-regulation of telecom markets in Canada will likely lead to an increase in the number of abuse complaints from industry participants requiring Bureau intervention.<sup>6</sup>

The draft guidelines were released against the backdrop of an expert panel report issued earlier in the year which recommended that a new tribunal be created with exclusive responsibility for applying the *Competition Act's* civil provisions to the telecommunications industry, such as the abuse of dominance and merger provisions (see *NAFTIR*, Vol. 16, No. 9, May 15, 2006). Although the Bureau would continue to be involved (there would be one Bureau representative on the proposed tribunal), the new body – if established – would clearly represent a diminution of the Bureau's jurisdiction in the telecom sector.

### Mergers

Merger enforcement was not specifically singled out by the Commissioner in her recent speeches as a Bureau priority for 2007. However, she did address the issue of efficiencies, but with a different message from that conveyed in the past.<sup>7</sup>

The last several years have witnessed a debate in Canada about efficiency issues, centering around the provision in the *Competition Act* which allows parties to claim efficiencies as a defense to the allegation that a merger would substantially prevent or lessen competition. Because of the Bureau's defeat in a contested merger case on these grounds, the previous Commissioner became somewhat preoccupied with the efficiencies issue. As a result, the Bureau first supported proposed amendments to the *Competition Act* that would have eliminated the defense entirely. When that effort stalled, the Bureau then commissioned an advisory panel to study the appropriate treatment of efficiencies in merger review. The

Bureau also indicated that it would refer any serious claims of efficiencies to the Competition Tribunal rather than deal with the issue internally.

The current Commissioner is now restoring some much needed perspective to this area. Recognizing that efficiencies are rarely a decisive issue in Canadian merger law (the case referred to above was the sole disputed case turning on the efficiencies defense in the last 20 years), the Commissioner has announced that the Bureau no longer considers it desirable or advisable to seek amendments to the law. She has also urged parties to make "robust and thoughtful" submissions to the Bureau on efficiencies when considered appropriate. The Bureau will not regard these submissions as an admission of anti-competitive concern or necessarily require recourse to the Tribunal.

Another merger initiative relates to the Bureau's recent release of its Information Bulletin on merger remedies.<sup>8</sup> The Bureau is proposing to follow up this document with an examination of approximately 30 closed merger files to assess whether the remedies that were implemented had the desired effect of avoiding a substantial prevention or lessening of competition. The project will include interviews with the merger participants and various third parties, with the results expected to be published sometime next year. This is a worthwhile venture – similar to what has been done in other jurisdictions such as the U.S. and EU – because it is important that the Bureau have an empirical foundation upon which to base its merger remedy policies.<sup>9</sup>

### Sectoral Studies

One of the shifts in emphasis introduced by the current Commissioner since she assumed office has been to focus more closely on the application of the *Competition Act* to discrete sectors of the Canadian economy. For example, the Commissioner has made much of her "sector days", in which she has met with representatives of various industries to discuss specific issues relating to their businesses.

While it is safe to say that most businesses, if they had a choice, would prefer not to be the subject of the Bureau's attention, the Commissioner has announced that at least two industries or categories of businesses will now be coming under heightened Bureau scrutiny: the pharmaceuticals industry and self-regulated professions.

With respect to pharmaceuticals, the Bureau has developed "a comprehensive work-plan for advocacy in this area". One project will involve a "market study" of the generic pharmaceuticals sector, which will look at questions such as why generic prices tend to be higher in Canada than in other "comparator countries".<sup>10</sup>

As for self-regulated professions, the Bureau has launched a study into a number of professions to determine the extent to which they may use restrictions to limit access or to control the competitive conduct of their members. The particular professions being studied are accountants, lawyers, optometrists, opticians, pharmacists and real estate agents.<sup>11</sup>

The Bureau's inquiry into self-regulated professions is in line with efforts by competition authorities in other jurisdictions, such as the U.S., EU and Ireland. If the example of these other jurisdictions is followed, the Bureau also could be initiating some manner of enforcement action against certain of these professions in the future.

Indeed, 2006 already saw the Bureau engage in several interventions with respect to self-regulated professions (albeit in an advocacy rather than litigation role). For example, the Bureau sent letters to the governments of Alberta, Nova Scotia and New Brunswick in March 2006 setting out eight general guiding principles that they should follow in modifying their regulations for dental hygienists. These guidelines address issues such as market access, transparency, impartiality and periodic re-assessment.<sup>12</sup> In June 2006, the Bureau persuaded Alberta's Real Estate Council to eliminate rules prohibiting real estate brokers from offering cash incentives to buyers and to remove certain restrictions on the payment of referral fees.<sup>13</sup>

The prospect of greater Bureau enforcement against self-regulated professions increases the likelihood of a clash between the requirements of the *Competition Act* and the provincial legislation and regulations that apply to these professions. Traditionally, the interface between the *Competition Act* and provincial laws has been governed by the so-called "regulated conduct defense" (RCD), which provides a form of immunity to persons engaged in conduct that is directed or authorized by other validly enacted legislation. The Bureau has made it clear, however, that it will not be deterred by the RCD from using the *Competition Act's* civil provisions to pursue anti-competitive conduct by self-regulated professions. This message is spelled out, for example, in a "Technical Bulletin" on the RCD which the Bureau released in June 2006.<sup>14</sup> In fact, according to public statements by the Commissioner, the Bureau is actively seeking an opportunity to bring this type of issue before the Competition Tribunal for adjudication.

<sup>1</sup> Competition Bureau, News Release, "Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy" (January 9, 2006), <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2018&lg=e>.

<sup>2</sup> *R. v. Bugdens Taxi*, 2006 CanLII 31901 (NL P.C.), <http://www.canlii.org/nl/cas/nlpc/2006/2006nlpc10069.html>.

<sup>3</sup> Sheridan Scott, Address to the Canadian Bar Association Annual Fall Conference on Competition Law (September 28, 2006), [http://www.competitionbureau.gc.ca/PDFs/SpeechFallCBAConference\\_06-09-28e.pdf](http://www.competitionbureau.gc.ca/PDFs/SpeechFallCBAConference_06-09-28e.pdf).

<sup>4</sup> The Immunity Program consultation paper and responding comments are available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=142&lg=e>. See also Denyse MacKenzie, "The Bureau's Immunity Program: Fine Tuning or Overhaul" (September 28, 2006), <http://www.competitionbureau.gc.ca/pdfs/2006-cba-conference-en.pdf>.

<sup>5</sup> *Canada (Commissioner of Competition) v. Canada Pipe Company Ltd.*, 2006 FCA 233 (CanLII), <http://www.canlii.org/ca/cas/fca/2006/2006fca233.html>.

<sup>6</sup> Competition Bureau, Information Notice, "Competition Bureau Seeks Public Comment on its Draft Bulletin on the Abuse of Dominance in Telecommunications" (September 26, 2006), <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2195&lg=e>.

<sup>7</sup> *Supra* note 3.

<sup>8</sup> Competition Bureau, Information Notice, "Competition Bureau Publishes Bulletin on Merger Remedies" (September 22, 2006), <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2169&lg=e>. See also NAFTAIR, Vol. 16, No. 5, March 15, 2006.

<sup>9</sup> *Supra* note 3.

<sup>10</sup> Sheridan Scott, "Antitrust in the Self-Regulated Professions: An International Perspective" (September 29, 2006), [http://www.competitionbureau.gc.ca/PDFs/Speech\\_FINAL\\_CBA\\_sept29\\_e.pdf](http://www.competitionbureau.gc.ca/PDFs/Speech_FINAL_CBA_sept29_e.pdf).

<sup>11</sup> *Ibid.* See also Sheridan Scott, "Competition and Innovation in a Flat World" (May 15, 2006), [http://www.competitionbureau.gc.ca/PDFs/Speech\\_Scott\\_competition\\_innovation\\_may06\\_e.pdf](http://www.competitionbureau.gc.ca/PDFs/Speech_Scott_competition_innovation_may06_e.pdf).

<sup>12</sup> See Competition Bureau letters sent to three provinces regarding proposed changes to legislation and regulations governing dental hygienists, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=783&lg=e>.

<sup>13</sup> *Supra* note 3.

<sup>14</sup> Competition Bureau, "Technical Bulletin on 'Regulated' Conduct" (June 2006), [http://www.competitionbureau.gc.ca/PDFs/final\\_rcdbulletin\\_e.pdf](http://www.competitionbureau.gc.ca/PDFs/final_rcdbulletin_e.pdf).

Mark Katz (MKatz@dwprv.com) is a partner in the Toronto office of Davies Ward Phillips & Vineberg LLP, where he is a member of the firm's Competition & International Trade Law Group.